

**EU-Canada Network Policy Brief**

# **CETA: An Innovative Agreement with Many Unsettled Trajectories**

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## Executive Summary

CETA innovates in many ways. The most significant innovation is that it deals with international regulatory cooperation and puts in place institutional mechanisms combining dialogue and trade obligations with regard to regulatory and governance issues. It also creates a civil society forum involved in the implementation process of chapters dealing with sustainable development, labor and the environment. Yet, nobody knows what this dialogue is going to be implemented and institutionalized precisely.

The Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union (EU) is one of the most innovative agreements among a third generation of trade agreements. A first wave of trade agreements was modelled on the European integration process and a second was influenced by the North American Free Trade Agreement (NAFTA), based on a contractual approach rather than the community-based approach of the European integration process. The third wave captured by CETA is rather different.

Does CETA innovate? The answer is, “Yes, in many ways”. Innovations include the definition of investment and the investor-state dispute settlement mechanism, the recognition of professional qualifications, the defense of culture and services as well as many others new path-breaking articles and chapters affecting trade and investment across the Atlantic. Yet, the real innovation is not in those areas per se, but in the fact that it introduces international regulatory cooperation into the body of the text and puts in place institutional mechanisms combining dialogue and trade obligations with regard to regulations and governance issues. It does so by introducing a chapter on regulatory cooperation as well as the institutionalization of regulatory forums, including a civil society forum involved in the implementation process of chapters dealing with sustainable development, labor and the environment.

### **Transatlantic regulatory cooperation**

Highly sensitive national regulations are presented often now as the last major obstacle to the free movement of goods and services, capital and even people. Yet, those regulations are at the core of our national systems and reflect societal values and priorities that should not be equated with protectionist measures even though in some instances they might indeed have impacts on trade and investment. It is appropriate to distinguish between what

is legitimate and belongs to the order of the common good and public interest, on the one hand, and diverse forms of disguised protectionism, on the other hand. But the essential point is not there.

Globalization and paradigm-shifting information and communication technologies have profoundly disrupted production methods, consumption patterns, and lifestyles. Interconnection, the networking of global value chains, the dematerialization of trade, and its de-territorialization, are at the heart of an upheaval that not only fundamentally changes trade flows and relations, but also changes the vision we have of trade and how it should be governed.

It is no longer enough for markets to be open across boundaries and to allow for fair competition within borders. National regulatory systems need to be interoperable. They need to ensure the fluidity in the new trade system that has arisen with new technologies. These technologies bring national economic systems closer to one another but often in the form of 'collision' or 'conflict', a situation that only benefits those that speculate on those differences.

We are on new ground, where trade agreements are based on new methods of negotiation which must take into account issues that are not strictly commercial. It is the particularity of new agreements like CETA to propose institutional frameworks to advance a "dialogue between regulators", to use an expression by Pascal Lamy,<sup>3</sup> former Director General of the World Trade Organization (WTO). CETA is one such agreement, along with the Trans-Pacific Partnership (TPP), which has now become the CPTPP (Comprehensive and Progressive Agreement for Trans-Pacific Partnership), the Atlantic Partnership, the Regional Comprehensive Economic Partnership (RCEP) or the United States, Mexico, Canada Agreement (USMCA). But let us concentrate on CETA.

CETA now has been implemented provisionally since September 2017; it is clear a new framework has been created for dialogue in commercial relations between the EU and Canada.<sup>4</sup> First, CETA points to international regulatory cooperation as a main ongoing trajectory in terms of market access, equal treatment and dispute resolution and also with regard to new subjects such as labour, the environment, small and medium-sized enterprises and domestic regulations. Second, the agreement introduces a new institutional framework, a partnership, which implies new institutions, dialogue and advisory groups will impact its interpretation and implementation, and thus its evolutionary path.

This is the case for CETA's Regulatory Cooperation Forum and the Civil Society Forum. Such mechanisms are opening new institutional trajectories for the regulation of transatlantic trade and investment. Why has this shift in the nature of trade negotiations taken place? First, many agreements, NAFTA being the first, bear the imprint of their time.

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<sup>3</sup> Richard Hiault, « Pascal Lamy: "Le Traité transatlantique est un accord de troisième génération" », *Les Échos* (20 octobre 2015), online : Les Echos <[www.lesechos.fr/20/10/2015/lesechos.fr/021418267703\\_pascal-lamy-le-traite-transatlantique-est-un-accord-de-troisieme-generation--.htm](http://www.lesechos.fr/20/10/2015/lesechos.fr/021418267703_pascal-lamy-le-traite-transatlantique-est-un-accord-de-troisieme-generation--.htm)>

<sup>4</sup> For an analysis of relations between the European Union and Canada and the content of the Agreement, see Christian Declock, Joël Lebullenger and Stéphane Paquin, *Un nouveau pont sur l'Atlantique : L'Accord économique et commercial global*. Québec, Presses de l'Université du Québec, 2015.

When NAFTA came into effect more than two decades ago, the revolution in information and communications technology was still in its infancy; the web had just emerged and, therefore, e-commerce did not exist. The emergence of global value chains (GVCs) is a second factor. Until the 1990s, the internationalization of multinational firms basically meant the establishment of subsidiaries abroad. Designed primarily to protect multinationals, NAFTA-type agreements were part of a dynamic of this kind of internationalization of firms. But, the internationalization has changed with the emergence of global value chains linking independent yet networked producers, distributors, large and small across the world. One word summarizes this new economic reality: fluidity - that of cross-border flows along GVCs. We see yet another even more globalized model emerging. That leads to a third factor related to the current digital transformations. We have entered a new world of interconnection that is not looking for fusion or unity but rather simply to connect different systems and units through codes, networks, data, standards and so forth.

In this new reality, states move forward and, short of being able to establish global shared rules and codes, they seek mutually recognized or interoperable technical, macro-prudential, social, and environmental norms. They do this using a variety of instruments, and trade agreements certainly can contribute. Most often, this process is privately led or induced but such institutional trajectories ultimately find their way back to national systems, and sometimes through trade agreements. Trade agreements always have the effect, once ratified, of modifying the laws, regulations and other administrative procedures of the contracting Parties. Initially limited to goods and tariffs, trade disciplines were extended to non-tariff barriers and then to services to cover trade facilitation today. The new agreement between the United States, Mexico and Canada addresses, like the TPP, digital trade and e-commerce which pose complex transnational societal challenges.<sup>5</sup>

CETA addresses regulatory cooperation in a number of areas, including in Chapter 12 dealing with Domestic Regulation, Chapter 21 addressing Regulatory Cooperation, Chapter 25 in relation to Bilateral Dialogues and Cooperation, and Chapter 26 setting administrative and institutional arrangements (specifying the list and terms of reference of the specialized committees, including the Joint Management Committee for Sanitary and Phytosanitary Measures, the Regulatory Cooperation Forum, the Committee on Geographical Indications, etc. - Article 26.2). Many other chapters involve regulatory cooperation, in many diverse ways, notably when it comes to electronic commerce, telecommunications, technical barriers to trade, and sanitary and phytosanitary measures.

Let's focus on Chapter 21 of CETA. Four objectives are defined in Chapter 21: 1) to contribute to the protection of the life, health or safety of persons or animals, the preservation of plants and the environment; 2) to build trust, deepen mutual understanding and building on each other's expertise; 3) to facilitate bilateral trade and investment; and 4) to improve the economic competitiveness and efficiency. The idea is to eliminate barriers to trade and investment, while fostering innovation and effective regulatory processes that support public policy objectives. CETA affirms the sovereignty of the Parties to legislate and regulate, the high level of quality sought for regulation and the

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<sup>5</sup> In this domain, we had witnessed the emergence of private rules, the work of the OECD addressing regulatory issues since 2010 or bilateral dialogues as in the case of the transatlantic dialogue between Canada and the EU.

freedom to choose to participate in mutually agreed upon cooperative activities. The goal is not so much to seek harmonization as to make the regulations compatible, to favor their convergence and thus to facilitate trade.

If reciprocity is, along with equal treatment, the cornerstone of the modern trading system, international regulatory cooperation does not fit this framework. Regulations, like any institution, have their history. They are not easy to change or even less to bring closer, since differences are rooted in history, politics and values. In many ways, when protectionism is alleged, it relates to the differences between regulatory systems and this most often is the tip of the iceberg of “singular and discriminatory” national regulatory systems. Certainly, the work of “cleansing” and rapprochement is justified, but it is difficult to distinguish between protectionist or restrictive measures, on the one hand, and measures justified by legitimate public policy objectives in the public interest, on the other.

With CETA, a Regulatory Cooperation Forum (RCF) is created “to facilitate and promote regulatory cooperation” and is co-chaired by high-level representatives at the Deputy Minister level for Canada and Executive Director for the European Commission. It reports to the Joint Committee. In CETA, the path chosen is cooperation, dialogue and transparency. The RCF does not have decision-making authority but its recommendations will count and, through the Joint Committee, become decision-making if accepted by both Parties. This is one of the unsettled trajectories as both Parties are reluctant to commit to strong trade obligations regarding regulatory issues.

Pluralism is also a key element (Deblock and Wells 2017). The cooperative dialogue is not limited to the regulatory agencies alone; it is extended to “private entities”. The term covers interested stakeholders, including representatives of the business community, academia, non-governmental organizations and specialized organizations. This opening reflects a new trend in the field of regulatory cooperation as not only are specialized technical organizations, private or not, increasingly involved in setting norms and standards, but there is also growing collaboration between government agencies and members of civil society.

It is questionable, however, whether by giving it a very broad mandate and by involving private entities in its operation, the RCF could make it possible to deal more effectively with societal issues such as the environment, labour, sustainable development, culture, etc. Although the issues are the subject of specific chapters (or particular exceptions) in CETA, as in many other trade agreements, their treatment in the agreements is debated still and the results do not satisfy anyone. The RCF could offer the opportunity to broaden the debate on intersecting issues and thereby interact with dialogue and cooperation activities that are the subject of the chapters regarding sustainable development, labor and the environment. This would contribute to anchoring regulatory cooperation in a more progressive pillar rather than one that is strictly technical/trade oriented. This leads us to consideration of the Sustainable Development Chapter and the two chapters it covers, labor and environment. It must be noted that it was the EU approach to have a sustainable development chapter dealing with two issues that was adopted. It remains highly problematic to see how this can be addressed since Canada has so far dealt with the issues separately. For instance, the EU

has only one advisory group while Canada has two different groups that do not yet share views.

### **Progressive transatlantic regulatory trajectory**

In this short article, we will concentrate on labour more specifically. Canada and the EU are two entities that have actively promoted the diffusion of such social clauses in trade agreements but CETA has the first social clause concluded between two developed trade partners, between two partners that have insisted on integrating labor chapters in trade agreements and between two transatlantic trade partners. This is very important since it may help to build a bridge between two approaches to these chapters – a North American approach versus a European approach.

Chapter 23 of CETA deals with labour issues. The chapter can lead one to conclude that there was a compromise in terms of obligations and a predominance of European preferences in terms of dispute and settlement mechanisms. On substance, the EU insisted on ratification of fundamental International Labor Organization (ILO) Conventions and on the integration of the chapter into a wider Sustainable Development Chapter in line with the European social clause model. Yet, the principles and obligations reflect a real consensus on the importance of the ILO Declaration on Fundamental Principles and Rights at Work (1998), which commits Member States, even if they have not ratified the relevant Conventions, to respect rights related to freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labor, the abolition of child labor and the elimination of discrimination in respect of employment and occupation. In CETA, thanks to the EU's pressure, Canada has now ratified all eight relevant Conventions. At least, it was done more rapidly than would have been expected.

On the issue of enforcement, CETA fell short of Canadian preferences. The enforcement mechanism is based on a conciliation procedure and, if necessary, the constitution of a panel of three experts. This falls short of Canada's insistence on a strong enforcement approach based on the same dispute settlement mechanism that applies to other chapters of the agreement. Let us recall the debate that almost derailed the negotiation on the investor-state dispute settlement resolution leading to a new institutional design unique to CETA (Magnette 2017). In contrast, no procedure provides for any penalty for the labour chapter, contrary to provisions related to other trade and investment chapters. There are two approaches for integrating social clauses in trade agreements: 1) conditional; and, 2) promotional. The conditional approach more often is used in the North American model, which makes the enforcement of labor chapters subject to penalties, or to dispute settlement mechanisms with relatively strong sanctions. The promotional approach, adopted by the EU, considers cooperation to be more effective than sanctions or penalties.

The main innovation remains the Civil Society Forum which will be very important in CETA's future institutional trajectory. It was created with the aim of increasing the involvement of civil society organizations in the agreement's implementation. The forum enables civil society to bring its concerns to the attention of governments. In order to make

this mechanism work, the Government of Canada has established a national advisory group of labour and environmental organizations. While these initiatives are still recent, the capacity of these mechanisms to effectively relay the demands of civil society organizations needs to be assessed.

Two models are interacting in this regulatory framework and there are many institutional uncertainties regarding the different interpretation of the text and how it translates in concrete terms both sides of the Atlantic.

## **Conclusion**

This global era is undoubtedly marked by the seal of interconnected and interoperable regulatory systems. The Organisation for Economic Co-operation and Development (OECD) has embarked on the challenge of regulatory issues, as trade agreements have made strong incursion into the domains of regulatory issues that are traditionally in the sovereign sphere. CETA is part of this transformation as regulatory cooperation is the subject of particular chapters, but it is also cross-cutting. The way that the newly-opened trajectories of ongoing cooperation and enforcement mechanisms are going to work is still unclear and unsettled. In this way, CETA is and will be an evolving agreement. The text of the agreement explicitly provides for this. Who will decide, however, on future developments of the agreement? The text gives latitude providing for civil society and private entities to play an important role in the regulatory cooperation process. What remains to be observed is who will engage and what trajectory CETA will take.

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